

OLL 83-2456
4 October 1983

MEMORANDUM FOR THE RECORD


SUBJECT: Introduced Legislation Concerning
Indemnifying Contractor Liability

1. Attached for your information is S. 1839, a Bill introduced in the Senate, to provide for an equitable reduction of liability of contractors with the United States in certain cases, to provide a comprehensive system for indemnification by the United States of its contractors for liability in excess of reasonably available financial protection, and for other purposes.

2. The Procurement Management Staff, Office of Logistics, has previously indicated no interest in attending the hearing scheduled for this legislation, indicating that the Agency would follow any resultant Department of Defense implementation if this Bill is ultimately enacted.


3. The Office of Legislative Liaison will continue to follow this Bill and will report its progress as appropriate.

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Liaison Division
Office of Legislative Liaison


Attachments
As stated

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LD/OLL:  (5 October 1983)

II

98TH CONGRESS
1ST SESSION

S. 1839

To provide for an equitable reduction of liability of contractors with the United States in certain cases, to provide a comprehensive system for indemnification by the United States of its contractors for liability in excess of reasonably available financial protection, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14 (legislative day, SEPTEMBER 12), 1983

Mr. GRASSLEY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for an equitable reduction of liability of contractors with the United States in certain cases, to provide a comprehensive system for indemnification by the United States of its contractors for liability in excess of reasonably available financial protection, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SHORT TITLE

4 SECTION 1. This Act may be cited as the "Contractor
5 Liability and Indemnification Act".

1
DECLARATION OF PURPOSE

2 SEC. 2. It is the purpose of this Act to establish fair and
3 equitable apportionment of liability incurred by contractors
4 with the United States by (i) providing for an equitable reduc-
5 tion of liability in cases in which acts or omissions of employ-
6 ees of the United States are wholly or partially the cause of a
7 contractor's liability to a Government employee, and (ii) pro-
8 viding a comprehensive system of complete indemnity for
9 contractors against liability in excess of reasonably available
10 financial protection.

11
DEFINITIONS

12 SEC. 3. As used in this Act—

13 (1) the term "contractor" means any person who
14 has contracted with the United States to supply a
15 product or service and such person's subcontractors
16 and suppliers at any tier for such purpose;

17 (2) the term "person" means any individual, cor-
18 poration (excluding a wholly owned corporation of the
19 United States), company, foundation, association, orga-
20 nization, firm, partnership, society, charitable institu-
21 tion, or State or local unit of government;

22 (3) the term "claimant" means any person who
23 asserts a claim which gives rise or may give rise to
24 liability;

1 (4) the term "State" includes the District of Co-
2 lumbia and all territories or possessions of the United
3 States;

4 (5) the terms "United States" and "contracting
5 agency" means the Federal executive agencies and de-
6 partments, the Federal military departments (including
7 any unit or part of the National Guard of any State),
8 independent establishments of the United States, and
9 corporations primarily acting as instrumentalities or
10 agencies of the United States;

11 (6) the term "liability" means the legally binding
12 obligation to compensate for harm as provided for in
13 final judgments of courts of law, settlements, or arbi-
14 tration decisions;

15 (7) the term "harm" means (a) damage to or loss
16 of use of property; (b) personal physical injury, illness,
17 or death; (c) mental anguish or emotional distress re-
18 sulting from an occurrence of personal physical injury,
19 illness, or death; and/or (d) financial detriment, includ-
20 ing loss of revenue or profits or other economic loss;
21 and

22 (8) the term "fault" means acts or omissions that
23 are in any measure negligent or wrongful with regard
24 to the harm incurred by a claimant.

1 EQUITABLE REDUCTION OF LIABILITY

2 SEC. 4. (a) In any civil action brought by an employee
3 of the United States or by the employee's legal representa-
4 tive, estate, spouse, dependent, survivor, or relative in any
5 State court or in any district court of the United States alleg-
6 ing liability of any contractor for harm concerning which the
7 employee or the employee's legal representative, estate,
8 spouse, dependent, survivor, or relative is or has been enti-
9 tled to receive worker compensation benefits from the United
10 States, upon request of any party the court shall make find-
11 ings of fact as to the proportion that the fault of the United
12 States bears to the total fault of all persons and the United
13 States in causing harm which gives rise to the claim of liabili-
14 ty. The court shall reduce any judgment for liability rendered
15 against the contractor by the proportion of fault of the United
16 States found by the court. The amount the United States is
17 entitled by law to obtain through right of subrogation or sub-
18 rogation lien arising from worker compensation payments for
19 harm concerning which contractors are or may be held liable
20 shall be reduced by the proportion of fault of the United
21 States in causing the harm.

22 (b) A contractor against whom a civil action alleging
23 liability is brought shall give written notice to the Attorney
24 General of the United States, within ninety days of the filing
25 of the civil action, if the contractor intends to seek an equita-

1 ble reduction of liability pursuant to subsection (a) of this
2 section. Except as otherwise directed, the contractor shall
3 promptly furnish to the Attorney General a copy of all perti-
4 nent papers received or filed with respect to such civil action.
5 The United States shall have the right, for a period of ninety
6 days following receipt of any such notice, to intervene as a
7 party in any such civil action. Any such civil action com-
8 menced in a State court in which the United States has inter-
9 vened may be removed, at the election of the United States,
10 along with any related pending action by a claimant, without
11 bond at any time before a trial on the merits, to the district
12 court of the United States for the district and division em-
13 bracing the place wherein the State court action is pending.
14 Should a United States district court determine, pursuant to
15 an evidentiary hearing on a motion to remand held before the
16 trial on the merits, that there is no substantial evidence of
17 any fault on the part of the United States in causing harm to
18 the employee of the Government, such civil action shall be
19 remanded to the State court.

20 (c) In determining the proportion of fault of the United
21 States pursuant to subsection (a) of this section, the court
22 shall consider such evidence of fault as may be introduced by
23 the parties in accordance with the rules of evidence and shall
24 consider, among other relevant factors, the following:

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1 (1) the nature of contract provisions or specifica-
2 tions associated with acts or omissions contributing to
3 the harm, the relative responsibility of the United
4 States and the contractor for the existence of such pro-
5 visions or specifications, and the relative degree of
6 knowledge, skill, and expertise of the contractor and
7 the United States as to potential harm which might be
8 associated with contract performance or nonperfor-
9 mance under such provisions or specifications;

10 (2) the existence of officially promulgated stand-
11 ards of the United States which are associated with
12 acts or omissions contributing to the harm;

13 (3) the degree to which products or services fur-
14 nished by the United States to the contractor under the
15 contract are associated with acts or omissions contrib-
16 uting to the harm, and the relative degree of knowl-
17 edge, skill, and expertise of the contractor and the
18 United States as to potential harm which might be as-
19 sociated with use of such products and services;

20 (4) acts or omissions in performance of the con-
21 tract by employees of the contractor or the United
22 States which contribute to the harm and the relative
23 responsibility of the contractor and the United States
24 for the occurrence of such acts or omissions; and

1 (5) the degree of control or care exercised by the
2 United States in the use, application, and maintenance
3 of products or services after delivery by the contractor.

4 (d) The provisions of this section supercede any State
5 law regarding matters covered by this section.

6 INDEMNIFICATION OF CONTRACTORS

7 SEC. 5. (a) The United States shall include in any con-
8 tract hereafter made, and may include by amendment or
9 modification in any contract heretofore made, a provision that
10 the United States will hold harmless and indemnify the con-
11 tractor against any of the claims or losses set forth in subsec-
12 tion (b), whether resulting from the negligence or wrongful
13 act or omission of the contractor or otherwise, except as pro-
14 vided in subsection (b)(2): *Provided*, That such provision shall
15 apply only to claims for losses arising out of or resulting from
16 risks that the contract defines as (1) unusually hazardous or
17 nuclear in nature or (2) giving rise to the possibility of liabili-
18 ty against which the contractor cannot reasonably protect
19 through private insurance or self-insurance: *And provided*
20 *further*, That no such provision shall be included in any con-
21 tract for procurement of goods or services which are sold by
22 the contractor to nongovernmental purchasers for uses or ap-
23 plications identical in nature, magnitude, and scope to the
24 uses or applications made or to be made of the goods and
25 services by the United States. A determination of whether

1 the conditions contained in the preceding sentence have been
2 met shall be made in advance by the head of the contracting
3 agency or his designee (who shall be an official at a level not
4 below that of an assistant to the head of the contracting
5 agency). A contractual provision for indemnification may re-
6 quire each contractor so indemnified to provide and maintain
7 financial protection of such type and in such amounts as is
8 determined by the head of the contracting agency or his des-
9 ignee to be appropriate under the circumstances. In deter-
10 mining whether conditions for the use of an indemnification
11 provision have been met and in determining the amount of
12 financial protection to be provided and maintained by the in-
13 demnified contractor, the appropriate official shall take into
14 account such factors as the availability, cost, and terms of
15 private insurance, self-insurance, other proof of financial re-
16 sponsibility, and worker compensation insurance. The deter-
17 mination of the head of the contracting agency or his desig-
18 nee as to whether conditions for use of a contractual provi-
19 sion for indemnification have been met shall be final for pur-
20 poses of the judicial review specified in subsection (c).

21 (b)(1) Subsection (a) of this section shall apply to claims,
22 including reasonable expenses of litigation and settlement, or
23 losses not compensated by insurance or otherwise, of the fol-
24 lowing types:

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1 (A) claims by third persons, including of the com-
2 tractor, for death, personal injury, or loss of, damage
3 to, or loss or use of properties;

4 (B) loss of, damage to, or loss of use of property
5 of the contractor;

6 (C) loss of, damage to, or loss of use of property
7 of the Government; and

8 (D) claims arising (i) from indemnification agree-
9 ments between the contractor and a subcontractor or
10 subcontractors, or (ii) from such arrangements and fur-
11 ther indemnification arrangements between subcontra-
12 ctors at any tier, provided that all such arrangements
13 were entered into pursuant to procedures prescribed or
14 approved by the contracting agency.

15 (2) Indemnification and hold harmless agreements en-
16 tered into pursuant to this section, whether between the
17 United States and a contractor, or between a contractor and
18 a subcontractor, or between two subcontractors, shall not
19 cover claims or losses caused by the willful misconduct or
20 lack of good faith on the part of any of the contractor's or
21 subcontractor's directors or officers or principal officials. For
22 purposes of this subsection, the term "principal officials"
23 means any of the contractor's managers, superintendents, or
24 other equivalent representatives who have supervision or di-
25 rection of (A) all or substantially all of the contractor's busi-

1 ness, (B) all or substantially all of the contractor's operations
2 at any one plant or separate location in which a contract is
3 being performed, or (C) a separate and complete major indus-
4 trial operation in connection with the performance of a
5 contract.

6 (3) The United States may discharge its obligation
7 under the contractual provision authorized by subsection (a)
8 of this section by making payments directly to contractors or
9 subcontractors or to third persons to whom a contractor or
10 subcontractor may be liable.

11 (c) A contractual provision under subsection (a) of this
12 section which provides for indemnification must also provide
13 for—

14 (1) notice to the United States of any claim or
15 action against, or any loss by, the contractor or sub-
16 contractor covered by such contractual provision; and

17 (2) control or assistance by the United States, at
18 its election, in the settlement or defense of any such
19 claim or action.

20 (d) Upon application by a contractor or subcontractor,
21 each contracting agency shall determine, or upon its own ini-
22 tiative, each contracting agency may determine, after oppor-
23 tunity for a hearing (in accordance with section 553 of title 5,
24 United States Code), whether any past, present, or future

1 contract or class or category of contracts involves risks of the
2 type set forth in subsection (a) of this section.

3 (e) Any contractor or subcontractor aggrieved by any
4 decision or determination of the contracting agency pursuant
5 to subsection (a) or subsection (d) of this section may, within
6 sixty days of such decision or determination, petition the
7 United States Court of Appeals for the Federal Circuit to
8 review such decision or determination. The decision or deter-
9 mination of the contracting agency with respect to questions
10 of fact, if supported by substantial evidence on the record
11 considered as a whole, shall be conclusive.

12 (f) The provisions of sections 1431-1436, title 50,
13 United States Code, shall not apply to indemnification of con-
14 tractors as provided in this section. The provisions of section
15 2354, title 10, United States Code, are hereby repealed. Sec-
16 tion 241(a)(7), title 42, United States Code, is hereby amend-
17 ed to delete the reference to section 2354, title 10, United
18 States Code. The provisions of this section shall not apply to
19 any risks against which indemnification may be obtained pur-
20 suant to section 2210, title 42, United States Code.

21 (g)(1) Notwithstanding the provisions of section 665,
22 title 31, or section 11, title 41, United States Code, contract-
23 ing agencies are hereby authorized to make indemnification
24 payments pursuant to any indemnification provisions of their
25 contracts from (A) funds obligated for the performance of the

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1 contract from which the contractor's liability arises; (B) funds
2 currently available for contracts of the nature of the contract
3 from which the contractor's liability arises, and not otherwise
4 obligated; (C) funds specifically appropriated for such pay-
5 ments; and/or (D) funds appropriated pursuant to section
6 724(a), title 31, United States Code.

7 (2) The Supplemental Appropriations Act, section
8 724(a), title 31, United States Code, is hereby amended by
9 adding the words "and section 5 of the Contractor Liability
10 and Indemnification Act" after the words "or 2677 of title
11 28".

12 EFFECTIVE DATE

13 SEC. 6. This Act shall be effective as of the date it is
14 signed into law by the President.

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